for discussion. Out of regard, however, for the carefully reasoned judgment of the learned trial judge I should mention a *dictum* of Vaughan Williams J. in the case of *In re South American and Mexican Company* (17) and certain general observations made by Lord Herschell in the Court of Appeal in the same case. The point can perhaps be best dealt with by quoting the following passage from the judgment of Fitz-Gibbon L.J. in the Irish case of *Irish Land Commission* v. *Ryan* (18) :—

"The only suggestion of estoppel by a judgment by default which I can find in the books is in a *dictum* of Vaughan Williams J. in the *South American and Mexican Company's Case*. He was dealing with a judgment *by consent*, but he says: 'It has always been the law that a judgment by consent, *or by default*, raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter.' He cites no authority for this proposition, and I can find none. The Judges in the Court of Appeal do not refer to a judgment by default, and it is curious that Vaughan Williams J. himself, in the immediately preceding sentence, gives a reason which does not apply to such a judgment, for he says: 'The basis of the estoppel is that *when parties have once litigated a matter* it is in the interest of the estate that litigation should come to an end, and *if they agree* upon a result or upon a verdict, or upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end'."

If they had been speaking in 1961 and not in 1895 and 1900 it may well be that both Vaughan Williams J. and FitzGibbon L.J. would have expressed themselves in rather more qualified terms. Be that as it may, it is clear that what the former said in relation to judgments by default must be regarded as *obiter*. In any event, the statement goes no further than saying that a judgment by default stands on no different footing than any other judgment from the point of view of the matter regarding which and the circumstances in which it gives rise to estoppels.

Returning to the present case, the application of the principle which has been stated is abundantly clear. The strict rule of *res judicata* prevents the defendants from denying that on 3rd November, 1954, which is the date of the judgment in Civil Suit No. 272 of 1954, they owed the plaintiff $23,400, which is the amount of the judgment in that case. The antecedent debt became merged in the judgment debt and that is irrespective of any question of it being a debt connected with a moneylending transaction (see *Cohen* v. *Jonesco* (19)). Again, there is an estoppel which prevents the defendants from denying that they executed the agreement of 20th June, 1952, and indeed they are estopped from denying any other averment of fact contained in the plaint in Civil Suit No. 272 of 1954. In my view, however, they are not estopped from averring that the plaintiff is a moneylender or any of the other facts on which they seek to base their defences under the Moneylenders Ordinance or the Bills of Sale Enactment. Whether or not these defences will succeed is, of course, an entirely different matter.

In all the circumstances, then, I would allow the appeal with costs and set aside the Order of the High Court dated 6th September, 1961. The defendants should have the costs of the demurrer proceedings in any event.

Hill J.A.: I have read the judgment of the learned Chief Justice with which I respectfully agree and to which I have nothing to add.

Good J.A.: I have had the benefit of reading the judgment of the learned Chief Justice, with which I agree, and I have nothing to add to it.

Appeal allowed.

Solicitors: *Lovelace & Hastings; T. K. Sen & Co.*

MOHAMED ALI v. PUBLIC PROSECUTOR

[A. Cr. J. (Ong J.) March 6, 1962]

[K.L. — Criminal Appeal No. 6 of 1962]

Penal Code, s.323 — Parties injured during scuffle — Pattern of conduct of a reasonable man — Real test to be applied.

Evidence Ordinance, 1950, ss.114, 157 — Veracity of witness doubtful — Whether should be scrutinised with care — Inaccurate account of injuries — Whether it reflects upon credit of witness — Admissibility of evidence — Presumptions of fact.

In a prosecution under section 323 of the Penal Code, once the veracity of a witness has been shown to be doubtful, the whole of his evidence must be scrutinised with care. However an inaccurate account by the witness of the injuries received during the confusion of a scuffle does not in any way reflect upon the credit of the witness and failure to produce a police report justified no inference of guilt of an accused person by the application of section 114(g) of the Evidence Ordinance.

The pattern of conduct of a reasonable man is not the test to be applied in these cases, the real question is, whether or not, in the circumstances, the complainant did behave unreasonably.

Observations on sections 157 and 114 of the Evidence Ordinance, 1950.

Cases referred to:—

(1) *R.* v. *Whitehead* [1929] 1 K.B. 99, 102.
(2) *Lam Choon & Co.* v. *Lim Yam Hong & Co.* [1931] S.S.L.R. 96; A.I.R. 1928, P.C. 127, 128.
(3) *R.* v. *Baskerville* [1916] 2 K.B. 658.
(4) *Berry* v. *British Transport Commission* [1961] 3 W.L.R. 450, 463.
(5) *Baxendale* v. *Bennett* (1878) 3 Q.B.D. 525, 529, C.A.
(6) *Public Prosecutor* v. *Idris* [1955] M.L.J. 234, 235.

CRIMINAL APPEAL.

P. J. Mooney for the appellant.

Harun Hashim (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Ong J.: The appellant was convicted in the Magistrate's Court at Kuala Lumpur, upon a charge of voluntarily causing hurt in contravention of section 323 of the Penal Code, and was bound over to be of good behaviour for one year, under section 173A of the Criminal Procedure Code. He appeals against such conviction.

The facts, as disclosed in the evidence, are very simple. On November 10, 1960, at about noon, a fight occurred in a bus belonging to the Sri Jaya Transport Co. Ltd. between the complainant, Suan Ooi Liang, who was conductor and ticket-seller on the vehicle, and the company's chief checking inspector, the present appellant. The bus had picked up a female passenger at Gurney Road, and shortly afterwards, the appellant boarded the vehicle and proceeded to check whether tickets had been sold to all the passengers. He found that the female passenger had no ticket. An argument ensued between the complainant and appellant, which was followed by a scuffle, resulting in injuries to both. During the struggle a police officer came in and restored order, after which he took them to the police station. As usual in such incidents, each party blamed the other for striking the first blow.

The learned magistrate thought that the contradictory evidence given by the complainant and his witness, the female passenger, was over an immaterial point, as concerning only the length and degree of their acquaintance. Nevertheless, he warned himself that he should look elsewhere for independent corroboration of the complainant's testimony. In the result he came to the conclusion that "the medical report confirmed the injuries he said he had received, while the police report confirmed the circumstances under which such injuries were received", and he held that there was a case to answer.

As regards the defence, the learned magistrate thought that the appellant failed to give a correct account of his injuries, and that his account of the circumstances which led to an attack on him by the complainant was highly improbable, because it made out the complaint as not behaving like a reasonable man. The learned magistrate in his grounds of judgment, went on as follows:—

> "So far as the circumstances leading to the fight were concerned, defendant's evidence was the only evidence. In the absence of the police report which he had made immediately after the fight and in view of the improbable quality of the defendant's story, I did not believe his story as true. I therefore found the defendant guilty."

In my judgment the conviction cannot be sustained. It was quite clear that the complainant had lied, as the learned magistrate said, about his acquaintance with the female passenger. Once his veracity had been shown to be doubtful, the whole of his evidence must be scrutinised with care. It could no longer be accepted at its full face value. Did the medical report as to his injuries, and the statement made by him in his own police report serve to support the truth of his allegations? The plain answer is, no. The injuries were just as consistent with his having been the aggressor as the victim of an attack. Both parties were injured, the complainant to a lesser extent, and he could have been injured by his opponent in self-defence. Neither was the police report of any genuine corroborative value even though it was admitted as corroboration under section 157 of the Evidence Ordinance, 1950. As was said in *R.* v. *Whitehead* [1] a witness cannot corroborate himself, otherwise it is only necessary for him to repeat his story some twenty-five times in order to get twenty-five corroborations of it. (See also *Lam Choon & Co.* v. *Lim Yam Hong & Co.* [2]). The female witness, who could only see blows struck by the appellant, but not by the complainant, obviously could not be held to be an impartial witness whose evidence was of any probative value. Therefore, upon the evidence before the court, the learned magistrate ought to have held that there was no case to answer at the close of the prosecution.

After calling on the defence, however, the learned magistrate erred further in finding the appellant guilty on the grounds stated by him. I think an inaccurate account of injuries received during the confusion of a scuffle in no way reflects upon the credit of the appellant. Failure to produce his police report, justified no inference of guilt of an accused person by the application of section 114(g) of the Evidence Ordinance. And an account which showed that the complainant was behaving unreasonably ought not to have been rejected as highly improbable merely on the ground that he, as a reasonable man, could hardly have behaved as alleged. The pattern of conduct of a reasonable man is not the test to be applied, in place of the real question, whether or not, in the circumstances, the complainant did so behave. A truculent person may behave most unreasonably, and, in fact, the appellant's whole case was that the complainant was unreasonable in his aggressiveness towards a fellow-servant of the company who was only carrying out his duty.

It will not be out of place here to say a few words about section 157 of the Evidence Ordinance. Admissibility of a previous statement under that section must not be confused with the weight to be given to it. Corroboration, strictly speaking, means independent corroboration as explained in *R.* v. *Baskerville* [3]. In my opinion true corroboration by independent evidence from an extraneous source should be distinguished from "corroboration" as it appears in section 157, which rests on the principle that consistency between a previous statement by a witness and his present evidence may afford some ground for believing him. The value of such a statement as corroboration may be infinitesimal, as in the majority of cases it is. On the other hand, by reason of the abundance of detail it may contain as to the facts and circumstances surrounding any relevant transaction, it may be capable of being cross-checked for truthfulness against other relevant evidence, in which case, of course, it may be effective corroboration, but only because it has been shown to be true.

In drawing presumptions under section 114 of the Evidence Ordinance, 1950, it is to be observed that what the section says is that the existence of certain facts may be presumed which the court "thinks likely to have happened" in

the circumstances of the particular case. Presumptions of fact must not be drawn automatically, or, as it were, by rule of thumb, without first considering whether in the circumstances of each particular case there were adequate grounds to justify any presumption being raised. Even, with regard to presumptions of law, Devlin L.J. said recently in *Berry* v. *British Transport Commission* [4]:—

". . . Presumptions of law ought to be used only where their use is strictly necessary for the ends of justice. They are inherently undesirable — in the sense that 'estoppels are odious', and the 'doctrine should never be applied without a necessity for it'; *per* Bramwell L.J. *Baxendale* v. *Bennett* [5] — because they prevent the court from ascertaining the truth, which should be the prime object of a judicial investigation, and because if they are allowed to multiply to excess, the law will become divorced from reality and will live among fantasies of its own."

Finally, as to the order made after conviction in this case, I think it is well for magistrates again to refresh their memory by referring to the observations of Thomson J. (as he then was) in *Public Prosecutor* v. *Idris* [6] regarding sections 173A and 294 of the Criminal Procedure Code.

This appeal is allowed; the conviction is quashed and the order under section 173A set aside.

Appeal allowed.

Solicitors: *Bannon & Bailey.*

MUTHIAH CHETTIAR v. JAGAT SINGH

[O.C.J. (Ong J.) March 10, 1962]

[K.L. — Originating Summons No. 137 of 1961]

Money and Moneylending — Charge as security — Note or memorandum given to chargee in compliance with s.16 of the Moneylenders Ordinance, 1951 — Omission in memorandum to set out powers of chargee contained in Land Code — Effect of — Whether these powers "terms" of the charge.

Section 16(3) of the Moneylenders Ordinance, 1951 requires, *inter alia*, that a note or memorandum of the contract containing all the terms of the contract, and where it is a term of the contract that a particular security be given in respect of it, the particulars of that security either in terms or by reference to, to be given by the chargee to the chargor.

In a question whether there was sufficient incorporation of the "terms" of the security in the note or memorandum by a bare reference therein to the charge without specific mention of the various powers and remedies given to a chargee by the Land Code,

Held: as only terms arising by express stipulation in the security must be included in the note or memorandum of the contract but no more, the note or memorandum in this case sufficiently complied with section 16(3) of the Ordinance and the security is enforceable.

Cases referred to:—

(1) *Mitchener* v. *Equitable Investment Co. Ltd.* [1938] 1 All E.R. 303, 304-5.

(2) *Central Advance and Discount Corporation Ltd.* v. *Marshall* [1939] 3 All E.R. 695.

(3) *Abirami Ammal* v. *M.S.M.M. Meyappa Chettiar* [1959] M.L.J. 149, 151.

(4) *Reading Trust Ltd.* v. *Spero* [1930] 1 K.B. 492.

ORIGINATING SUMMONS.

L. P. Thean for the applicant.

K. Chelvanayagam for the respondent.

Cur. Adv. Vult.

Ong J.: The applicant, as chargee of certain land in Kuala Lumpur, of which the respondent is the registered proprietor, took out this originating summons calling on the respondent to show cause why such land should not be sold by public auction to satisfy the principal sum and interest due under the charge. The application is resisted by the respondent.

The applicant is, and at all material times was, a licensed moneylender to whom the Moneylenders Ordinance, 1951 applies. On December 28, 1959, he lent the respondent a sum of $9,000 bearing interest at 12 per cent. per annum. The loan was secured by a charge executed in the form prescribed by Schedule XIV(a) of the Land Code. In intended compliance with the provisions of section 16 of the Ordinance a note or memorandum of the contract was given to, and its receipt acknowledged by, the respondent as borrower, before the money was lent or the charge executed, but no copy of the charge was supplied to the respondent. However, in the note or memorandum of the contract, particulars of the security were set out as follows:

"The borrower shall before the receipt of the abovementioned sum of $9,000 (Dollars Nine thousand only) execute in favour of the lender a memorandum of charge over the land held under Certificate of Title No. 11,571 Lot No. 637, section 46 in the Town and District of Kuala Lumpur, containing an area of 1 acre 1 rood 00.7 pole as security for the repayment of the same and interest thereon as aforesaid."

The case for the respondent is that, by reason of the applicant's omission to deliver to him a copy of the charge together with the note or memorandum of the contract, the security is unenforceable because the note or memorandum failed to set out "all the terms of the contract" in strict compliance with the provisions of section 16(3) of the Ordinance. The subsection reads as follows:

"(3) The note or memorandum aforesaid shall contain all the terms of the contract and in particular shall show separately and distinctly —

(a) the date of the loan;

(b) the principal; and

(c) the rate of interest per centum per annum payable in respect of such loan or, where the rate is not expressed in terms of a rate per centum per annum, the rate of such interest."

It was not suggested that in all other respects, except as to the terms of the security, there was an insufficient compliance with the requirements of subsection (3). But, relying on the analogy presented in *Mitchener* v. *Equitable Investment Co. Ltd.* [1], it was contended that the note or memorandum did not even by reference, could it be said to have set out the several powers and remedies given to a chargee by sections 135, 136, 137 and 138 of the Land Code in case of default by the chargor. In *Mitchener's*